

HOUSE BILL No. 1432

DIGEST OF INTRODUCED BILL

Citations Affected: IC 5-14.

Synopsis: Access to public records. Requires a public agency to respond to a request to inspect or copy a public record not later than seven working days after the request is made. Allows a public agency to extend by not more than 30 days the time within which the agency must grant or deny a request or provide the records if the agency: (1) responds within seven working days; and (2) specifies the reason that an extension is necessary. Requires a person to file a formal complaint with the public access counselor before filing an action in court to compel disclosure of a public record. Provides that a formal complaint must be filed with the public access counselor not later than 15 days after a request to inspect or copy a public record is denied and that an action must be filed in court not later than 60 days after a request is denied. Provides that a prevailing plaintiff in an action to compel disclosure of a public record may collect attorney's fees and court costs only if the defendant's denial of access to the public record was arbitrary and capricious. Establishes the public access education fund. Provides for a civil penalty of \$1,000 against the person designated by a public agency as being responsible for public records release decisions for the public agency, if the person knowingly or intentionally denies access to a public record in violation of the public records law. Requires that any civil penalties collected be deposited in the public access educational fund. Repeals a provision that states that a formal complaint concerning access to public records need not be filed with the public access counselor before an action is filed in court.

Effective: July 1, 2007.

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January 26, 2007, read first time and referred to Committee on Public Policy.

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Introduced

First Regular Session 115th General Assembly (2007)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2006 Regular Session of the General Assembly.

HOUSE BILL No. 1432

A BILL FOR AN ACT to amend the Indiana Code concerning state and local administration.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 5-14-3-8.6 IS ADDED TO THE INDIANA CODE
2 AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
3 1, 2007]: **Sec. 8.6. (a) A person may make a request for inspection**
4 **or copying of a public record:**

- 5 (1) in person;
6 (2) by telephone;
7 (3) by enhanced access;
8 (4) by mail; or
9 (5) by electronic mail.

10 **(b) A public agency that receives a request for inspection or**
11 **copying of a public record shall respond by:**

- 12 (1) granting the request;
13 (2) denying the request;
14 (3) granting the request in part and denying the request in
15 part;
16 (4) extending the time within which the agency must grant or
17 deny the request; or

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(5) granting the request but extending the time within which the agency must provide the record.

(c) Except as provided in subsection (d), if a public agency does not respond to a request for inspection or copying of a public record not later than seven (7) working days after the date on which the public agency receives the request, the request is considered to be denied.

(d) If a request for access to a public record is sent to a public agency by electronic mail and the public agency does not respond to the request not later than seven (7) working days after the date on which the public agency receives the request, the request expires. If a request sent to a public agency by electronic mail has expired under this subsection, the person who made the request may renew the request only:

- (1) in person;
- (2) by telephone; or
- (3) by facsimile.

A public agency that receives a renewed request under this subsection shall respond to the renewed request not later than seven (7) working days after the public agency receives the renewed request.

(e) For purposes of subsection (d), a request for access to a public record that is sent to a public agency by electronic mail is considered to be received by the public agency one (1) business day after the date on which the electronic mail is sent.

SECTION 2. IC 5-14-3-8.7 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 8.7. (a) A public agency must comply with this section in order to do any of the following:

- (1) Deny under section 8.6(b)(2) or 8.6(b)(3) of this chapter a request for inspection or copying of a public record.
- (2) Extend under section 8.6(b)(4) of this chapter the time within which the public agency must grant or deny a request for inspection or copying of a public record.
- (3) Extend under section 8.6(b)(5) of this chapter the time within which the public agency must provide access to the public record in compliance with a request that has been granted.

(b) Except as provided in subsection (c), a denial under section 8.6(b)(2) or 8.6(b)(3) of this chapter or an extension of time under section 8.6(b)(4) or 8.6(b)(5) of this chapter:

- (1) must be set forth in writing; and

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(2) may be provided to the person who made the request:

(A) in person; or

(B) by mail, electronic mail, or facsimile.

(c) If a request for inspection or copying of a public record was made in person or by telephone, the public agency responding to the request may:

(1) communicate the agency's denial or extension of time orally to the person who made the request; and

(2) send a written notice of the denial or extension of time to the person who made the request not later than seven (7) working days after the date on which the public agency received the request.

(d) A written notice of denial under section 8.6(b)(2) or 8.6(b)(3) of this chapter must include the following:

(1) A statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record.

(2) The name and the title or position of the employee of the public agency who is responsible for the denial.

(3) A statement that if the person who made the request wants to seek judicial review of the denial, the person must file a formal complaint with the public access counselor not later than fifteen (15) days after the date on which the person receives the denial.

(4) The address and telephone number of the public access counselor.

(e) A written notice of extension of time under section 8.6(b)(4) or 8.6(b)(5) of this chapter must contain the following:

(1) A statement of why an extension of time is necessary, which must include at least one (1) of the following reasons:

(A) The requested records are stored in whole or in part at locations other than the office having charge of the requested records.

(B) The request requires the collection of a substantial number of specified records.

(C) The request requires an extensive search for the records responsive to it.

(D) The requested records have not been located in the course of a routine search and additional efforts are being made to locate them.

(E) The requested records require examination and evaluation by personnel having the necessary competence and discretion to determine whether the requested records

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are exempt from disclosure or should be disclosed only with appropriate deletions.

(F) The public agency cannot comply with the request for records within seven (7) working days without unduly burdening or interfering with the operations of the public agency.

(G) There is a need for consultation, which shall be conducted with all practicable speed, with another public agency or among two (2) or more components of a public agency having a substantial interest in the determination or in the subject matter of the request.

(H) The public agency must consult with the counterterrorism and security council as set forth in section 8.8 of this chapter.

(2) The date by which the public agency will do the following:

(A) Grant or deny the request. The date may not be later than thirty (30) days after the date on which the public agency received the request.

(B) Provide the records in response to a request that has already been granted. The date may not be later than thirty (30) days after the date on which the person who made the request received notice from the public agency that the request has been granted.

(f) A request for inspection or copying of a public record is considered to be denied if a public agency fails to:

(1) grant or deny the request, in the case of an extension under section 8.6(b)(4) of this chapter; or

(2) provide the records in compliance with a request that has been granted, in the case of an extension under section 8.6(b)(5) of this chapter;

by the date set forth in the notice of extension.

SECTION 3. IC 5-14-3-8.8 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 8.8. (a) Notwithstanding section 2(a) and 2(l) of this chapter, as used in this section, "public agency" means any board, commission, department, division, bureau, committee, agency, office, instrumentality, or authority, by whatever name designated, exercising any part of the executive, administrative, judicial, or legislative power of the state.

(b) If a public agency receives a request to inspect or copy a public record that the public agency considers to be excepted from disclosure under section 4(b)(19) of this chapter, the public agency

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may consult with the counterterrorism and security council established by IC 10-19-8-1. If a public agency denies the disclosure of a record or a part of a record under section 4(b)(19) of this chapter, the public agency or the counterterrorism and security council shall provide a general description of the public record being withheld and of how disclosure of the public record would have a reasonable likelihood of threatening the public safety.

SECTION 4. IC 5-14-3-9, AS AMENDED BY P.L.22-2005, SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 9. (a) A denial of disclosure by a public agency occurs when the person making the request is physically present in the office of the agency; makes the request by telephone; or requests enhanced access to a document and:

(1) the person designated by the public agency as being responsible for public records release decisions refuses to permit inspection and copying of a public record when a request has been made; or

(2) twenty-four (24) hours elapse after any employee of the public agency refuses to permit inspection and copying of a public record when a request has been made;

whichever occurs first:

(b) If a person requests by mail or by facsimile a copy or copies of a public record; a denial of disclosure does not occur until seven (7) days have elapsed from the date the public agency receives the request:

(c) If a request is made orally, either in person or by telephone; a public agency may deny the request orally. However, if a request initially is made in writing, by facsimile, or through enhanced access; or if an oral request that has been denied is renewed in writing or by facsimile; a public agency may deny the request if:

(1) the denial is in writing or by facsimile; and

(2) the denial includes:

(A) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and

(B) the name and the title or position of the person responsible for the denial.

(d) This subsection applies to a board; a commission; a department; a division; a bureau; a committee; an agency; an office; an instrumentality; or an authority; by whatever name designated; exercising any part of the executive; administrative; judicial; or legislative power of the state. If an agency receives a request to inspect or copy a record that the agency considers to be excepted from

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disclosure under section 4(b)(19) of this chapter, the agency may consult with the counterterrorism and security council established by IC 10-19-8-1. If an agency denies the disclosure of a record or a part of a record under section 4(b)(19) of this chapter, the agency or the counterterrorism and security council shall provide a general description of the record being withheld and of how disclosure of the record would have a reasonable likelihood of threatening the public safety.

(e) (a) A person who has been denied the right to inspect or copy a public record by a public agency may file an action in the circuit or superior court of the county in which the denial occurred to compel the public agency to permit the person to inspect and copy the public record. **However, a person may not initiate an action under this section unless:**

(1) the person files a formal complaint with the public access counselor under IC 5-14-5 not later than fifteen (15) days after the date on which the person's request to inspect or copy the public record was denied; and

(2) the action is filed in the circuit or superior court not later than sixty (60) days after the date on which the person's request to inspect or copy the public record was denied.

(b) Whenever an action is filed under this ~~subsection~~, **section**, the public agency must notify each person who supplied any part of the public record at issue:

(1) that a request for release of the public record has been denied; and

(2) whether the denial was in compliance with an informal inquiry response or advisory opinion of the public access counselor.

Such persons are entitled to intervene in any litigation that results from the denial. The person who has been denied the right to inspect or copy need not allege or prove any special damage different from that suffered by the public at large.

(f) (c) The court shall determine the matter de novo, with the burden of proof on the public agency to sustain its denial. If the issue in de novo review under this section is whether a public agency properly denied access to a public record because the record is exempted under section 4(a) of this chapter, the public agency meets its burden of proof under this subsection by establishing the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit.

(g) (d) If the issue in a de novo review under this section is whether a public agency properly denied access to a public record because the

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record is exempted under section 4(b) of this chapter:

(1) the public agency meets its burden of proof under this subsection by:

(A) proving that the record falls within any one (1) of the categories of exempted records under section 4(b) of this chapter; and

(B) establishing the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit; and

(2) a person requesting access to a public record meets the person's burden of proof under this subsection by proving that the denial of access is arbitrary or capricious.

~~(h)~~ (e) The court may review the public record in camera to determine whether any part of it may be withheld under this chapter.

~~(i)~~ (f) In any action filed under this section, a court shall award reasonable attorney's fees, court costs, and other reasonable expenses of litigation to the prevailing party if:

(1) the plaintiff substantially prevails **and the court finds the defendant's denial of access to the public record was arbitrary or capricious;** or

(2) the defendant substantially prevails and the court finds the action was frivolous or vexatious.

~~The plaintiff is not eligible for the awarding of attorney's fees, court costs, and other reasonable expenses if the plaintiff filed the action without first seeking and receiving an informal inquiry response or advisory opinion from the public access counselor; unless the plaintiff can show the filing of the action was necessary because the denial of access to a public record under this chapter would prevent the plaintiff from presenting that public record to a public agency preparing to act on a matter of relevance to the public record whose disclosure was denied.~~

~~(j)~~ (g) A court shall expedite the hearing of an action filed under this section.

SECTION 5. IC 5-14-3-9.1 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: **Sec. 9.1. (a) A person who is designated by a public agency as being responsible for public records release decisions for the public agency and who knowingly or intentionally denies a request for the inspection or copying of a public record in violation of this chapter is subject to a civil penalty of one thousand dollars (\$1,000).**

(b) The clerk of the court shall forward a civil penalty collected

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under this section to the treasurer of state for deposit in the public access education fund established by IC 5-14-4-14.

SECTION 6. IC 5-14-4-14 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 14. (a) The public access education fund is established to fund a program established under section 10(1) of this chapter to train public officials and educate the public on the rights of the public and the responsibilities of public agencies under the public access laws.

(b) The fund consists of the following:

- (1) Civil penalties collected under IC 5-14-3-9.1.
- (2) Money appropriated by the general assembly.
- (3) Grants, gifts, contributions, and money received from any other source.

(c) The counselor shall administer the fund. The following may be paid from money in the fund:

- (1) Expenses of administering the fund.
- (2) Nonrecurring administrative expenses incurred in carrying out the purposes of this section.

(d) Money in the fund at the end of a state fiscal year does not revert to the state general fund. Money in the fund is continuously appropriated to the counselor for the purposes specified in this section.

(e) The treasurer of state shall invest the money in the fund not currently needed to meet the obligations of the fund in the same manner as other public funds may be invested. Interest that accrues from these investments shall be deposited in the fund.

SECTION 7. IC 5-14-5-6 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 6. (a) A person or a public agency denied ~~(+)~~ the right to inspect or copy records under IC 5-14-3 or any other state statute or rule governing access to public records must file a formal complaint with the counselor under the procedure prescribed by this chapter as a prerequisite to filing an action under IC 5-14-3-9.

~~(2)~~ (b) A person or public agency denied:

- (1) the right to attend any public meeting of a public agency in violation of IC 5-14-1.5; or
- ~~(3)~~ (2) any other right not described in subsection (a) or subdivision (1) that is conferred by IC 5-14-3 or IC 5-14-1.5 or any other state statute or rule governing access to public meetings or public records;

may file a formal complaint with the counselor under the procedure

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prescribed by this chapter or may make an informal inquiry under IC 5-14-4-10(5).

SECTION 8. IC 5-14-5-7 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 7. (a) A person or a public agency that chooses to file a formal complaint with the counselor must file the complaint not later than ~~thirty (30)~~ **fifteen (15)** days after:

(1) the denial; or

(2) the person filing the complaint receives notice in fact that a meeting was held by a public agency, if the meeting was conducted secretly or without notice.

(b) A complaint is considered filed on the date it is:

(1) received by the counselor; or

(2) postmarked, if received more than ~~thirty (30)~~ **fifteen (15)** days after the date of the denial that is the subject of the complaint.

SECTION 9. IC 5-14-5-9 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 9. (a) Except as provided in section 10 of this chapter, the counselor shall issue an advisory opinion on the complaint not later than thirty (30) days after the complaint is filed.

(b) The counselor's failure to issue an advisory opinion on a complaint not later than thirty (30) days after the complaint is filed does not bar the person or public agency that filed the complaint from filing an action under IC 5-14-3-9. However, if the person or public agency that filed the complaint files an action under IC 5-14-3-9, the counselor may not issue an advisory opinion after the action has been filed.

SECTION 10. IC 5-14-5-4 IS REPEALED [EFFECTIVE JULY 1, 2007].

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